85-2052

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LEON JUDSON WOOD, III,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

FRANK RAGANO
620 East Twiggs Street
Tampa, Florida 33602
813/229-1191

Attorney for Petitioner
LEON JUDSON WOOD, III

31pp

QUESTION PRESENTED

Whether the Government denied Petitioner's right to due process of law when it entered into an immunity agreement with the Petitioner, and thereafter obtained from the Petitioner invaluable information concerning corruption by the State Attorney's Office involving drug cases, utilizing Petitioner's testimony to obtain a conviction in a drug case, then declaring the immunity agreement to be null and void and later obtaining from the Petitioner the very facts that are the basis for the indictment that was returned against him.

PARTIES BELOW

United States of America

Leon Judson Wood, III

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

OPINION BELOW

The United States Court of Appeals for the Eleventh Circuit reversed the judgment of the United States District Court for the Middle District of Florida dismissing the Indictment that had been returned against the Petitioner. The Court of Appeals entered its Order denying Rehearing on April 17, 1986. Copies of the Opinion and Order of the Court of Appeals along with the United States Magistrate's Report and Recommendation and the District Court's Order dismissing the Indictment appear in the Appendix.

JURISDICTION

The original judgment of the Court of Appeals was entered on January 21, 1986. Rehearing was denied on April 17, 1986. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> "No person shall be . . . deprived of life, liberty, or property without due process of law;"

STATEMENT OF THE CASE

Petitioner, LEON JUDSON WOOD, III, was initially charged with federal crimes in the First Superseding Indictment, naming Petitioner and thirty-eight others, in Case Number 84-24-Cr-T-10, *The United States of America v. Norman Cannella, et al.* (Middle District of Florida, Tampa Division) returned on March 12, 1984. Petitioner was named in Counts One and Two, charging, respectively, violations of Title 18, United States Code, Section 1962(c) Racketeer Influenced and Corrupt Organizations and in Count Two, Conspiracy to violate Title 18, United States Code, Section 1962(c) in violation of Title 18, United States Code, Section 1962(d).

On May 7, 1984, Petitioner filed a Motion in Bar of Prosecution, Dismissal of Indictment or Specific Performance. The Motion, in accord with the local rule of Court, was accompanied by an exhibit consisting of an immunity agreement dated May 20, 1983 on the stationary of the United States Attorney for the Middle District of Florida.

Subsequent to the filing of the aforesaid Motion, District Court Judge William Terrell Hodges, who was and is the Chief

Judge for the Middle District of Florida, reserved ruling on the Motion and referred it to the United States Magistrate "for an evidentiary hearing and/or such other proceeding as may be necessary to the preparation and filing of a report and recommendation concerning the disposition of the issues presented". As a consequence of Judge Hodges' Order, Petitioner's trial was severed from that of his co-defendants.

An evidentiary hearing on the Petitioner's Motion was held on August 22, 1984, before United Stat s Magistrate Paul Game, Jr. The Magistrate's six page Report and Recommendation concerning the petitioner's Motion was dated and filed with the District Court on September 17, 1984. The Magistrate's findings were:

> (1) that the Government had failed to establish that Petitioner had breached the terms of the agreement;
> (2) that the Government and Petitioner were bound by the terms of the agreement;
> (3) that Petitioner, at that time, was entitled to specific performance of the immunity agreement.

The Magistrate went on to recommend that the charges in the indictment then pending against Petitioner be dismissed *without prejudice*.

Judge Hodges, by Order dated and filed March 7, 1985, adopted and confirmed the Magistrate's Report and dismissed the Indictment against Petitioner.

The Government filed its Notice of Appeal to the Eleventh Circuit Court of Appeals.

The Court of Appeals reversed the judgment of the District Court dismissing the indictment and reinstated the indictment on which the Petitioner is awaiting trial.

Petitioner commenced cooperating with the Hillsborough County Sheriff's Office and the Florida Department of Law En-

forcement during the latter part of 1981. At that time Petitioner had been arrested for trafficking in drugs. As a result of his cooperation with the State agents, the State of Florida was able to charge and convict at least four (4) defendants on drug charges. Petitioner cooperated with the State authorities for approximately six (6) months.

Shortly prior to May 20, 1983, while Petitioner was incarcerated at Lake Butler Correctional Institution, Special Agents Wooldridge and Holland of the F.B.I. visited him and interviewed him.

The immunity agreement provided that Petitioner would fully and truthfully disclose to law enforcement officers knowledge that he possessed concerning offers to, attempts to, or the actual bribery of any public official concerning drug importation, distribution and conspiracies involving drugs and about any other matters that the Government might inquire about. It further provided that Petitioner would fully and truthfully testify before Grand Juries and at trials of cases at which his testimony would be relevant. The Government, in return for his cooperation, obligated itself not to charge him with any violations of law for past conduct fully disclosed to, or already known by the Government, including bribery, drug trafficking or racketeering. The agreement further provided that in the event that Petitioner should fail in any way to fulfill his obligations under the immunity agreement, the Government would be free to bring charges against him.

It was Petitioner's understanding that if he told the Government what he knew about bribery attempts, drug importation and trafficking, he would not thereafter be prosecuted.

At the next meeting with the Special Agents Petitioner told them about a bribery attempt in the Hillsborough County State Attorney's Office involving the Chief Assistant State Attorney and his payment of Fifty Thousand ($50,000.00) Dollars to one Angelo Bedami to influence said Chief Assistant State Attorney

regarding the drug charges that were pending against him. Petitioner met with the Special Agents on approximately seven (7) different occasions with each meeting lasting from one and one-half (1½) hours to three (3) hours. It was Petitioner's understanding that in return for his cooperation he would be granted immunity from both State and Federal prosecution and he felt that he had acted in good faith with the State and Federal law enforcement agents.

In January of 1984, Petitioner was charged with a drug violation in Jacksonville, Florida and was arrested by Special Agents Wooldridge and Holland. Three (3) days before he was tried on said charges he was indicted in the case *sub judice*. Petitioner testified on his own behalf in the Jacksonville case and was acquitted.

On April 3, 1984, Government Counsel once again informed Petitioner's then Counsel that he considered the agreement null and void, but that if Petitioner would testify on behalf of the Government in the case of *United States of America v. Armando and John Tamargo*, Case No: 83-122-Cr-T-15, he would consider it as grounds for negotiating a new immunity agreement. United States Attorney Robert W. Merkle also advised Petitioner's Counsel that Petitioner's cooperation in the *Tamargo* case would not preclude him from attempting to reinstate or enforce the original immunity agreement.

On the advice of his Counsel, Petitioner refused to testify and was thereupon given immunity in return for his testimony. Petitioner successfully testified on behalf of the Government in the *Tamargo* case, which resulted in guilty verdicts. Petitioner's Counsel was then told that either United States Attorney Robert W. Merkle or Assistant United States Attorney Lee William Atkinson, would be in touch with him regarding further discussions concerning a new immunity agreement. Petitioner's Counsel attempted to reach the said Counsel during the following two (2) or three (3) weeks and neither one of said Counsel would return his telephone calls. Shortly thereafter, Petitioner advised

his Counsel that he had been interviewed by Special Agents Wooldridge and Holland, as well as Agent Miller of the Florida Department of Law Enforcement, on April 18, 1984. The said interview lasted a couple of hours and Petitioner was interviewed about, inter alia, the very allegations contained in Counts One and Two of the Indictment (the only Counts in which Petitioner is charged) in the case *sub judice*. The interview was conducted in the absence of Petitioner's Counsel and without his knowledge.

The Courts have recognized the power of trial Courts to order specific performance of immunity agreements and have held that such judicial power does not violate the doctrine of separation of powers, because it derives from the Court's exercise of its supervisory powers. *United States v. Pavia*, (D.D.C. 1969), 294 F.Supp. 742.

When the Government enters into an immunity agreement with a defendant and the defendant relies on that agreement in good faith, as the Petitioner did, the Courts will not permit the defendant to be prejudiced as a result of his reliance upon the agreement. *United States v. Phillips Petroleum Co.*, (N.D.Okl. 1977), 435 F.Supp. 622; *United States v. Goodrich*, (C.A. Ariz. 1974), 493 F.2d 390; *United States v. Bowler*, (C.A. Ill. 1978), 585 F.2d 851.

When the Government gives its word to or enters into an immunity agreement with one of its citizens, the Government must be held to that agreement and keep its promises. *United States v. Phillips Petroleum Co.*, supra.

The Courts have not been loathe to order performance of immunity agreements by the Government, *Correale v. United States*, (1st Cir. 1973), 479 F.2d 944, even if this compelled dismissing an indictment. *United States v. Lieber*, (E.D.N.Y. 1979), 473 F.Supp. 884.

In the case *sub judice* it is apparent that the primary conduct on the part of the Petitioner that the Government is con-

cerned with took place *subsequent* to the time that the Government made it known to the Petitioner that it considered the immunity agreement null and void. Since these matters occurred *subsequent* to said time, Petitioner was not under any obligation to cooperate with the Government. Notwithstanding the foregoing, the Government utilized Petitioner's testimony in the *Tamargo* case to its benefit and thereafter interviewed Petitioner about the very facts alleged in the first and second Counts of the Indictment in the case *sub judice*. If the Government is permitted to prosecute Petitioner, he would most certainly be prejudiced as a result of his reliance upon the immunity agreement. Moreover, the Government is estopped from prosecuting Petitioner since it continued to utilize his testimony and continued to interview him *after* it declared the immunity agreement to be null and void. *United States v. Martin*, (S.D. Texas 1979), 480 F.Supp. 880.

REASONS FOR GRANTING THE WRIT

1. THE GOVERNMENT'S BREACH OF THE IMMUNITY AGREEMENT THAT IT ENTERED INTO WITH THE PETITIONER, AFTER THE PETITIONER FURNISHED THE GOVERNMENT WITH INFORMATION THAT WAS UTILIZED BY THE GOVERNMENT AND THE INDICTMENT OF THE PETITIONER ON THE VERY FACTS FURNISHED TO THE GOVERNMENT BY THE PETITIONER, RAISES SIGNIFICANT QUESTIONS REGARDING THE GOVERNMENT'S POLICIES AND CONDUCT.

The most serious threat to our society today is the widespread use of drugs, which is threatening the very fiber of our form of government and our system of criminal justice. Every law-abiding citizen in this nation is concerned about the effect that the use of drugs is having on our society. We are all in agreement that the importation of drugs must be stamped out in order to maintain the society that we all cherish and the freedoms that are guaranteed to us under our Constitution that we all enjoy.

Because the investors in drug dealings insulate themselves from the actual smugglers and distributors of drugs, it is imperative that the Government encourage individuals who are involved in those drug activities to come forward and cooperate with law enforcement agencies. It is common knowledge that there is a high level of secrecy surrounding the individuals that are so engaged. In order to encourage citizens to cooperate with our law enforcement agencies, it is most important that the Government be made to keep its promises when it enters into immunity agreements with its citizens.

If the Government is permitted to breach its immunity or plea agreements with cooperating citizens, such conduct would obviously discourage citizens from cooperating with the Government, thereby making it even more difficult to stamp out the tidal wave of drugs that are entering this Country.

Since this Honorable Court has not had the occasion to establish guidelines regarding the Government's obligations in connection with immunity agreements under the facts and circumstances contained in the case *sub judice*, we respectfully submit that there are compelling reasons why some definitive guidelines should not be spelled out by this Honorable Court.

Where liability is at stake, gamesmanship is out of place. The Government should not be permitted to run hot and cold with the rights of its citizens as it did with the Petitioner herein and this can only be avoided in the future by the granting of this Petition for Writ of Certiorari and thereafter the rendering of an opinion setting forth definitive guidelines that would in the future prevent the reoccurence of what has taken place in the case *sub judice*.

2. ONE OF THE CLEAR CUT ISSUES RAISED BY THE PETITIONER IN THE APPEAL WAS WHETHER OR NOT UNDER THE FACTS AND CIRCUMSTANCES OF THE CASE THE GOVERNMENT WAS ESTOPPED FROM BREACHING THE IMMUNITY AGREEMENT IT HAD ENTERED INTO WITH THE PETITIONER AND THEREAFTER INDICTING HIM.

The record herein clearly reflects that the Government not only continued to utilize the information provided to it by the Petitioner, but actually had the Petitioner testify on behalf of the Government, as the Government's key witness, in a drug case, which resulted in the defendants being convicted, *after* it had declared the immunity agreement to be null and void. Moreover, astonishingly, on the eve of the indictment being returned against the Petitioner in the case *sub judice*, two F.B.I. Agents interviewed the Petitioner for several hours, in the absence of his Counsel, and obtained from the Petitioner during said interview the very facts which are the basis for the indictment that was returned against Petitioner.

The major issue of estoppel under said facts and circum-

stances was clearly before the Court of Appeals. However, the Court of Appeals utterly ignored said issue, and in fact, made no mention of it in its opinion.

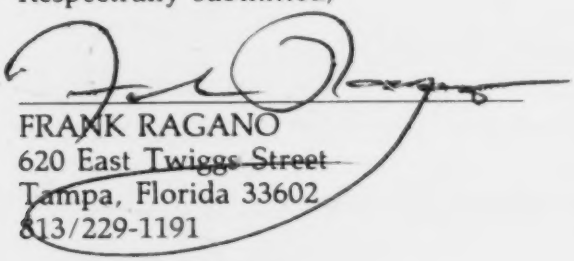
The trier of the facts, an experienced United States Magistrate, made his findings of fact to support his Report and Recommendation, which was adopted by the Chief Judge of the Middle District of Florida, which concluded that the Government was bound by the immunity agreement that it had entered into with the Petitioner. The Court of Appeals simply reevaluated the witnesses' testimony and made its own findings of fact. For some odd reason, the opinion of the Court of Appeals does not cite one solitary legal authority in support of its ruling. It simply substituted its findings of fact for those of the trier of the facts.

We most respectfully submit to this Honorable Court that the Government's conduct deprived the Defendant of his constitutional right to due process of law and that this Honorable Court should grant this Petition for Writ of Certiorari and specifically address the issue of estoppel. This Honorable Court should thereafter establish definitive guidelines regarding the Government's obligations under an immunity agreement so that in the future citizens who are desirous of cooperating with the Government in connection with drug activities will be encouraged to do so rather than be discouraged, as they would be if the Court of Appeals' ruling is allowed to stand.

CONCLUSION

For the aforementioned reasons, and in the interest of justice, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

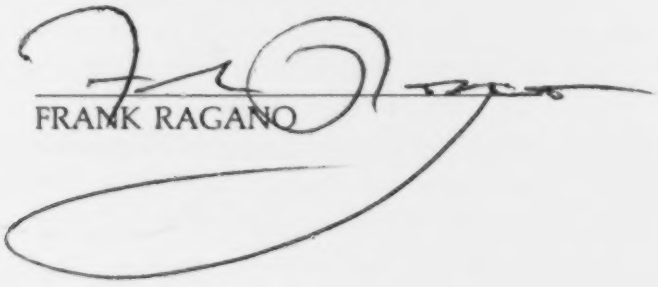


FRANK RAGANO
620 East Twiggs Street
Tampa, Florida 33602
813/229-1191

Attorney for Petitioner
LEON JUDSON WOOD, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Petition for Writ of Certiorari has been furnished, by mail, this 12th day of June, 1986 to Robert W. Merkle, United States Attorney, 500 Zack Street, Room 410, Tampa, Florida 33602.



FRANK RAGANO

APPENDIX

UNITED STATES of America,
Plaintiff-Appellant,

v.

Leon J. WOOD, III,
Defendant-Appellee.

No. 85-3261.

United States Court of Appeals,
Eleventh Circuit.

Jan. 21, 1986.

In prosecution for violations of the Racketeer Influenced and Corrupt Organizations Act, the United States District Court for the Middle District of Florida, Hodges, Chief Judge, dismissed indictment against defendant, concluding that nonprosecution agreement entered into by the Government and defendant barred prosecution, and the Government appealed. The Court of Appeals held that defendant's failure to disclose his part in possible drug deal amounted to a substantial breach of agreement nullifying Government's promise not to prosecute defendant, even though defendant was acquitted on drug charges arising out of incident in question.

Reversed and remanded.

Criminal Law

Fact that alleged drug deal was not under investigation and that the Government did not specifically inquire about incident did not justify defendant's failure to disclose his knowledge of drug deal, where defendant admitted that he understood that he was required pursuant to nonprosecution agreement with Government to fully disclose all information he possessed concerning drug activities, and thus, defendant's failure to disclose his part in such incident amounted to a substantial breach of agreement nullifying Government's promise not to prosecute defendant, even though defendant was acquitted on charges arising out of alleged drug deal.

Appeal from the United States District Court for the Middle District of Florida.

Before HILL and HENDERSON, Circuit Judges, and TUTTLE, Senior Circuit Judge.

PER CURIAM:

This is an appeal from the government's unsuccessful attempt to prosecute Leon J. Wood, III for violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) and (d). The United States District Court for the Middle District of Florida, adopting the magistrate's report and recommendation, dismissed the indictment against Wood, concluding that a non-prosecution agreement entered into by the government and Wood barred the prosecution. We reverse.

On May 20, 1983, while Wood was incarcerated at Florida's Lake Butler Correctional Facility for narcotics violations, he entered into a covenant with the government in which the government agreed not to prosecute Wood if he consented to

> fully and truthfully disclose to law enforcement everything that he knows concerning offers to, or the actual bribery of any public official concerning any matter, about any other matter, including drug importation and drug distribution conspiracies now under investigation, and about any other matters as to which the Government may inquire and shall not at any time willfully fail to disclose any fact material to any such inquiry or matter.

The agreement also provided that if Wood "should fail in any way to fulfill completely each and every one of his obligations, then the Government will be free from its obligations to Mr. Wood."

Between May and December 1983, the FBI interviewed Wood on numerous occasions asking him about various matters relating to bribery attempts and drug trafficking. On January 12, 1984, Wood was arrested on narcotics charges for activities which allegedly took place in the Jacksonville area. He was subsequently acquitted by a jury of those charges. In April, 1984, government agents informed Wood that he had breached the immunity agreement. After the parties met unsuccessfully to work out their differences, the government indicted Wood in the case currently pending before this court.

An evidentiary hearing was held before a United States Magistrate on August 22, 1984. Subsequently, in a written report and recommendation, the magistrate concluded that the government failed to establish a "substantial breach of the specific terms of the agreement" and that Wood was entitled to "specific enforcement of the agreement." Magistrate's Report and Recommendation at 6. The district court adopted the report on March 7, 1985 and subsequently dismissed the indictment.

On appeal, the government first contends that the district court improperly applied a substantial compliance standard to Wood's obligations under the agreement instead of a strict compliance criterion. Second, it maintains that the district court's finding that Wood substantially complied with the contract is clearly erroneous. Because we agree with the latter argument, we need not decide whether the district court erred by adopting a substantial compliance rule.

The government alleges that on numerous occasions Wood withheld information pertaining to bribery attempts or drug transactions until he was confronted with independent facts establishing that he actually had knowledge of the relevant incidents. For example, United States Attorney Joseph Magri testified at the hearing before the magistrate that the government learned that Wood has sold cocaine to John Tamargo but Wood did not admit to the sale until after Magri challenged this denial with facts derived from another source. Supplemental Record on Appeal, Vol. III at 209, 212. Also, the government contends that Wood intially told them that he had paid $50,000.00 to Angelo Bedami to have him bribe state officials in the Hillsborough County Sheriff's Office but that he asked for a return of the money. Subsequently, the government discovered that Wood had again furnished the money to Bedami and when they confronted him with that fact, he admitted that he did give the money to Bedami on a second occasion. Supplemental Record on Appeal, Vol. III at 135. The government urges that these incidents, along with numerous others,[1] demonstrate a breach of the agreement.

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1. Wood admitted at the hearing that he initially did not tell the government about the involvement of David Grimes in drug transactions because Grimes was "like a brother to him." Wood did tell the government about Grimes' drug activities in subsequent interviews. *See* Appendix to Appellant's brief at 193.

In response, Wood simply claims that he eventually cured all of these alleged violations and that the district court's finding that he did not breach the agreement because of the corrections should be sustained. Even if we were to agree with this explanation, we must overturn the district court's decision because Wood breached the agreement by not disclosing the drug activities leading up to his arrest in Jacksonville.

Wood admitted at the hearing before the magistrate that he attempted to set up a drug deal with Robert Grogan in Jacksonville. Supp. Record on Appeal, Vol. II at 28, 34. He was arrested for these activities and subsequently acquitted by a jury. He testified at his trial that he was acting as a quasi-law enforcement officer attempting to set up Grogan and that he never intended to actually consummate the drug transaction. He reaffirmed this position in the hearing before the magistrate. *Id.* at 36. He also admitted that he did not tell the government about these efforts. He testified as follows before the magistrate:

Q. You were engaged in an undercover operation on your own; is that your testimony?

A. Yes, sir, I was.

Q. And you had knowledge that other individuals were attempting to commit a crime involving a large amount of narcotics; isn't that correct?

A. They were talking about it, yes, sir.

Q. And you did not reveal that information to Agent Wooldrige?

A. No, sir . . .

Id.

Wood defends his failure to inform the government about the Jacksonville drug scheme on the ground that he was never asked about it. He stated that he was only asked about drug activities in the Tampa Bay area and not in Jacksonville. Assuming the truth of that testimony, it is nonetheless clear that Wood breached the agreement by intentionally withholding the information. Wood described his obligations under the agreement:

> My understanding was that I would give information, tell them everything I knew about bribe attempts or drug importation and trafficking that was then under investigation *or that I had knowledge of* and in return I would not be prosecuted in any way by the federal government. (emphasis added).

Id. at 10.

In light of this concession, Wood's explanation for his failure to tell the government about the drug activities in Jacksonville does not satisfy the requirements of his contract. He admitted that he knew about a possible drug deal and yet failed to disclose that information to the government purportedly because they did not specifically mention Jacksonville in their inquiry.[2] Under his own interpretation of his duties under the contract, however, he had a continuing obligation to reveal that information regardless of whether he was specifically asked about it. In our view, this failure to disclose the Jacksonville drug activities, standing alone, constitutes a substantial breach of the contract.

The district court held that Wood's failure to tell the government agents of his Jacksonville activities did not amount to a substantial breach of the contract because the "matter was not under investigation at the time of the agreement, the Government did not make specific inquiry concerning the matter [and] the incidental references to possible police corruption has [sic] been fully disclosed by Mr. Wood both at trial and thereafter. Mr. Wood was acquitted by a jury that must have found his testimony credible in arriving at its conclusion." Record Excerpts at 110. The fact that the Jacksonville episode may not have been under investigation and that the government may not have made specific inquiry about it does not justify Wood's failure to disclose his knowledge of the drug scheme in light of his admission that he understood that he was required to fully disclose all informa-

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2. Wood also testified that he didn't tell the government about his dealings in Jacksonville because he wanted to acquire all the information at one time and then "put everything in their lap for them." Otherwise he was afraid that the government "would have blown the whole case for me." Supp. Record on Appeal, Vol. II at 40. This reason does not excuse Wood's clear breach of the contract in light of the fact that he never came forward and told the government about the Jacksonville activities.

tion that he possessed concerning drug activities.[3] Furthermore, his acquittal on charges arising out of this course of conduct is irrelevant to the issues here because Wood has admitted that he had knowledge of people attempting to engage in illegal drug pursuits. It is simply not germane that a jury believed Wood when he testified that his participation in those transactions was for a lawful purpose.

We hold that Wood's failure to disclose his part in the Jacksonville drug undertaking amounted to a substantial breach of the contract and the district court's finding to the contrary is clearly erroneous. Therefore, under the terms of the agreement, Wood's failure to comply with his obligations nullifies the government's promise not to prosecute him and the government is entitled to have the indictment reinstated.[4]

REVERSED and REMANDED.

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3. Wood's version of his obligations is consistent with the wording of the agreement and the government's understanding of the agreement.

4. Wood argues that it would be unfair to allow the government to use statements that he made after the time that the government considered the contract breached. This issue, however, relates to the admissibility of those statements not to the question of whether Wood violated the agreement. We express no opinion as to the admissibility of any statements made by Wood either before or after the breach of the contract.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
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No. 85-3261

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

LEON J. WOOD, III,

Defendant-Appellee.

Appeal from the United States District Court for the
Middle District of Florida

ON PETITION(S) FOR REHEARING
( )

BEFORE: HILL, Circuit Judge and HENDERSON and TUTTLE, Senior Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellee is denied.

ENTERED FOR THE COURT:

/s/ James C. Hill
United States Circuit Judge

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

-vs- CASE NO. 84-24 CR-T-10

LEON J. WOOD, III

ORDER

This cause came on for consideration upon the filing of a motion in bar of prosecution, dismissal of indictment or specific performance by the Defendant, Leon J. Wood, III, on May 7, 1984. The Defendant asserts that the Government is bound by a written agreement in which the Government agreed not to charge the Defendant with any violations of law for past conduct fully disclosed to, or already known by the Government, including bribery, drug trafficking or racketeering offenses, all in exchange for the Defendant's cooperation concerning "offers to, attempts to, or the actual bribery of any public official concerning any matter, about any other matter, including drug importation and distribution conspiracies now under investigation, and about any other matter as to which the Government may inquire." In response to the Defendant's motion the Government contends that it is no longer bound by the agreement because the Defendant breached his part of the bargain by providing false or misleading information and by willfully failing to disclose information.

The matter was considered by the United States Magistrate pursuant to special reference by the Court and Rule 6.01(c)(14), M. D. Fla. Rules. On August 22, 1984 the Magistrate conducted an evidentiary hearing on the Defendant's motion. In his subsequent Report and Recommendation, filed September 19, 1984, the Magistrate determined that the Government failed to establish that the Defendant breached the terms of the agreement, that both the Government and the Defendant are bound by its terms, and that the Defendant is entitled to specific performance. Based upon this determination the Magistrate recommended that the indictment against the Defendant be dismissed without prejudice to

the right of the Government to indict the Defendant on the same charges in the event he later breaches his agreement. The Government filed an objection to the report on September 26, 1984, to which the Defendant responded on October 3, 1984.

Upon consideration of the Report and Recommendation and upon the Court's independent examination of the record, the Magistrate's Report is adopted and confirmed and made a part hereof, and it is

ORDERED:

That the indictment against the Defendant, Leon J. Wood, III, is DISMISSED.

DONE and ORDERED at Tampa, Florida, this 7th day of March, 1985.

/s/ William Terrell Hodges
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

VS. Case No. 84-24-Cr.-T-10

LEON J. WOOD, III
Defendant.

REPORT AND RECOMMENDATION

Before the Court for consideration is a motion to dismiss indictment filed on behalf of defendant Leon Wood, III. On May 20, 1983, the United States Attorney for this district, and the defendant Leon Wood III, entered into a written agreement (Wood's Exhibit A), providing that the Government would bring no criminal charges against Defendant Wood for any violations of law for past conduct fully disclosed to, or already known by, the Government in exchange for his cooperation in fully disclosing specific information to the government. Defendant moves the court to dismiss the instant indictment against him, asserting his right to specific performance of the agreement not to bring these criminal charges against him. The Government claims that the defendant breached the agreement and that it is therefore not bound by the provision that it would not indict defendant Wood. An evidentiary hearing was held to determine the factual issues presented.

The letter agreement specified that Mr. Wood:

"(1) . . . shall fully and truthfully disclose to law enforcement everything that he knows concerning offers to, attempts to, or the actual bribery of any public official concerning any matter, about any other matter, including drug importation and distribution conspiracies now under investigation, and about any other matter as to which the Government may inquire and shall not at any time willfully fail to disclose any fact material to any such inquiry or matter; except that Mr. Wood shall have the option not to answer questions, directly bearing on the cocaine charge now pending against him in state court . . ."

In determining the nature, scope and effect of the agreement, contract principles apply. This agreement, however (inartfully) phrased, at most binds Mr. Wood to disclose (1) everything known relating to *bribery of public officials*, (2) everything known about *any matter now under investigation*, (3) anything about *any other matter "as to which the Government may inquire,"* and (4) shall not *willfully* fail to disclose any *fact material to any such inquiry or matter*, and (5) that he shall testify fully and truthfully before any federal grand jury and at all trials.

The agreement does not require, by its terms, that Mr. Wood shall "fully cooperate with the Government" in every possible way as the Government has argued.

The Government contends that the agreement was executory and, like a plea agreement, is not binding and may be withdrawn by the government until adopted by the court. The Government cites, in support of its argument, the case of *Mabry v. Johnson*, US , 104 S.Ct. 2543 (1984). In that case a plea agreement offered by the Government and accepted by the defendant was withdrawn by the prosecutor. The defendant thereafter accepted the prosecutor's second offer and entered a guilty plea pursuant to the second offer. The Supreme Court held that acceptance of the prosecutor's first proposed plea bargain did not create a right to have the first agreement specifically enforced in light of the subsequent voluntary, informed plea of guilty. Contrary to the Government's argument, *Mabry* is inapposite. In the instant case the agreement is not a plea agreement and it is binding on the government because in this instance, court action was not a precondition to enforcement of the Government's obligations under the agreement. *United States v. Lieber*, 473 F.Supp. 884, 893 (E.D. N.Y. 1979). The Government will not be allowed to avoid its obligation under the agreement by claiming that the language of the agreement promises nothing to the defendant Wood in light of the defendant's waiver of his Fifth Amendment right to remain silent. *United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978).

The government has the burden of establishing the breach by substantial evidence. *United States vs. Williams*, 569 F.2d 823 (5th Cir. 1978); *United States vs. Calabrese*, 645 F.2d 1379 (10th Cir. 1981), cert. den. 101 S.Ct. 3008.

Contract principles will be applied insofar as their utilization will insure to the defendant what is reasonably due him in the circumstances. *Santebello v. New York*, 404 U.S. 257, (1971); *United States v. Lieber*, 473 F.Supp. 884, 891 (E.D. N.Y., 1979). However, the parol evidence rule will not be rigidly applied to bar evidence in construing the agreement. *United States v. Swinehart*, 614 F.2d 853 (3rd Cir. 1980), cert denied, 449 U.S. 827 (1980).

The Government argues that Mr. Wood breached the agreement by his failure to timely advise the Government concerning his involvement in activities leading up to criminal charges against him and others in the case tried in the Jacksonville Division of this Court, *United States of America vs. Leon Wood, et al.*, Case No. 84-10-Cr. J-12. The Government contends that the fact that Mr. Wood did not volunteer information concerning events leading up to the Jacksonville drug charge prior to his arrest in that case constituted a breach of the agreement. However, such initial failure to disclose information does not establish a substantial breach of the terms of the agreement. The matter was not under investigation at the time of the agreement, the Government did not make specific inquiry concerning the matter, the incidental references to possible police corruption has been fully disclosed by Mr. Wood both at trial and thereafter. Mr. Wood was acquitted by a jury that must have found his testimony credible in arriving at its decision.

Mr. Wood at interviews in August, September, 1983, (Gov. Exhibit 4) disclosed a $50,000.00 bribe attempt, providing information that he had paid money to bribe an official but stating that the money had been returned. At a later interview on December 12, 1983 (Gov. Exhibit 5), Wood informed government agents that after return of the bribe money, he paid $50,000.00 bribe money which was not returned to him. The government contends that failure to make full disclosure at the August - September, 1983 interviews resulted in a breach of the agreement, because Wood withheld material information at that time. However, any breach of the agreement to fully disclose was cured by the later disclosure.

As of March 27, 1984, the Government took the position that Mr. Wood had breached the agreement and that the Government was no longer bound by the agreement. Wood furnished information material to the Government's case in *United States v.*

Tamargo M.D.Fla. Case No. 83-122 Cr.-T-15 and testified in that case as a government witness after being granted immunity. The fact that Wood sought and obtained judicial immunity as a prelude to his testimony in the *Tamargo* Case is not inconsistent with, nor did it constitute a violation of this agreement, in light of the government's position that the agreement had been breached. See *United States v. Pavia*, 294 F.Supp 742 (D.C. 1969). The government does not contend that Mr. Wood did not testify fully and truthfully.

The Government is dissatisfied by Wood's performance, because he did not volunteer certain information, did not timely furnish information, and did not "fully cooperate" with Government agents." The Government, by testimony and argument, has made vague references to additional false information furnished by Mr. Wood and additional failures to furnish information. However, the Government has failed to establish a substantial breach of the specific terms of the agreement with Mr. Wood. The Court can only test Mr. Wood's performance against the specific requirements of the written agreement and cannot apply a "full cooperation" or a "substantial assistance" standard to his performance of his obligations, as the terms of the agreement do not require such expansive performance.

Accordingly, I find: (1) that the Government has failed to establish that the defendant, Leon Wood, has breached the terms of the agreement, (2) that the Government and defendant Wood are bound by the terms of the agreement, and (3) that defendant Wood is entitled to specific performance of the agreement at this time. I therefore recommend that the indictment against Defendant Leon Wood be dismissed without prejudice to later indict on the same charges in the event that Mr. Wood substantially breaches the agreement at any time hereafter.

This 17th day of September, 1984.

/s/ Paul Game, Jr.
PAUL GAME, JR.
UNITED STATES MAGISTRATE

Supreme Court, U.S.
FILED
JUL 7 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-2052

In the Supreme Court of the United States

OCTOBER TERM, 1985

LEON JUDSON WOOD, III, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the court of appeals erred in reversing an order dismissing an indictment because the government failed to adhere to a non-prosecution agreement.

On March 12, 1984, petitioner was added as a defendant in two counts of a twenty-count superseding indictment returned in the United States District Court for the Middle District of Florida. The indictment charged him with participation in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), and conspiracy to commit that offense, in violation of 18 U.S.C. 1962(d). Before trial, petitioner moved to dismiss the indictment on the ground that the government had breached an agreement in which it had agreed not to prosecute him in exchange for truthful information about bribery attempts

and drug trafficking. The government responded that it was no longer bound by the agreement because petitioner had breached the agreement by withholding evidence and providing false information.

Following an evidentiary hearing, a magistrate concluded that the government had failed to establish a substantial breach of the agreement and recommended that the indictment against petitioner be dismissed (Pet. App. 10a-13a). On March 7, 1985, the district court adopted the magistrate's report and dismissed the indictment (Pet. App. 8a-9a).

On January 21, 1986, the court of appeals reversed (Pet. App. 1a-6a). It held that the district court's finding was clearly erroneous because the record showed that petitioner had violated the agreement by not disclosing his role in a drug operation in Jacksonville, Florida.

Petitioner contends (Pet. 8-10) that the court of appeals should have affirmed the magistrate's factual finding and that the government should therefore be estopped from prosecuting him. Whatever the merits of petitioner's contentions, they are not presently ripe for review by this Court.[1] The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to dismiss. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed on appeal, he will then be able to present his contentions to this Court, together with any

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[1]It is now more than 27 months since the return of the indictment and more than 15 months since the district court's dismissal order. Further interlocutory review at this time would cause additional delay in the final resolution of the charges against petitioner.

other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1986

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[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.